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SUMMARY OF TYLER V. HILLSDALE COUNTY SHERRIFF'S DEPARTMENT

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MENTAL ILLNESS AND FIREARM POSSESSION

Should a person previously involuntarily committed to a mental health facility be forever barred from owning a firearm?

No, says a divided Sixth Circuit Court of Appeals, in *Tyler v. Hillsdale County Sheriff's Department.*

The case is not precedential for all jurisdictions.

ISSUE

Summary of *Tyler v. Hillsdale County Sherriff's Department*.

SUMMARY

In *Tyler v. Hillsdale County Sheriff's Department* (--- F.3d ----, 2016 WL 4916936) a divided Sixth Circuit Court of Appeals ruled that a person who "has been adjudicated intellectually disabled" or "has been committed to a mental institution" is not permanently barred from possessing firearms.

Despite showing no evidence of mental illness, Tyler could not legally possess firearms under federal law because 30 years ago he had been involuntarily committed to a mental health facility for 30 days. And he could not get his firearm rights restored because his home state of Michigan, unlike several other states, had not established a federally authorized program that could grant him relief and allow him to possess firearms.

Tyler filed a federal lawsuit seeking a declaratory judgment that the statute (18 U.S.C. § 922(g)(4)) is unconstitutional, as applied to him. The federal district court dismissed the case, citing Tyler's failure to state a claim, but a panel of the Sixth Circuit reversed and sent the case back (remanded) to the district court.

Subsequently, the full Sixth Circuit Court reheard the case and, in September 2016, by a 10 to six vote, reversed and remanded the case to the district court to apply intermediate scrutiny to determine the statute's constitutionality as applied to Tyler. The en banc court acknowledged that (1) *Heller* (*District of Columbia v.*

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Heller, 554 U.S. 570 (2008)) permitted, as constitutional, laws that keep mentally ill people from getting firearms and (2) the government's interests in curbing crime and preventing suicides are legitimate and compelling. But the court said the statute overreaches by permanently barring a person involuntarily committed to a mental institution—however briefly—from owning a gun.

Writing the lead opinion for six judges, Judge Julia Gibbons wrote that under intermediate scrutiny, the burden of justification is demanding and it rests entirely on the State and "in discharging this burden, the government can rely on a wide range of sources, including legislative history, empirical evidence, case law, and even common sense, but it may not 'rely upon mere anecdote and supposition"' (*Tyler*, No. 13-1876, slip op. at 20). In this case, according to Judge Gibbons, the government had not presented sufficient evidence of the continued risk presented by persons who were previously committed (*id.* p. 24). Thus the statute, as applied, given the evidence supplied, failed the intermediate scrutiny test.

The case drew several separate opinions. Judge Gibbons summed it up as follows: "Ten of us would reverse the district court; six of us would not. And at least twelve of us agree that intermediate scrutiny should be applied, if we employ a scrutiny-based analysis" (*id.* at 27). Given the breath of opinions, the court reversed and remanded the case to the district court to apply intermediate scrutiny to determine the statute's constitutionality as it applied to Tyler.

In remanding the case, the court said the government could justify the statute's constitutionality by providing (1) additional evidence of the necessity for a lifetime ban or (2) evidence showing that the statute is constitutional as applied to Tyler because he would be a risk to himself or others if allowed to possess a firearm (*id*. at 27).

CASE FACTS AND PROCEDURAL HISTORY

Federal law prohibits anyone "who has been adjudicated as a mental defective" or "who has been committed to a mental institution" from possessing firearms (18 U.S.C. § 922(g)(4)). The term "committed to a mental institution" means a formal involuntary commitment by an appropriate judicial authority following due process safeguards (27 C.F.R. § 478.11).

A person can regain his or her firearm privileges if granted relief by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) or under an approved state program that meets specified standards outlined in the 2007 NICS Improvement Amendments Act. But the ATF relief program has been inoperative for lack of

congressional funding. And some states, including Michigan, Tyler's home state, have not established a program.

Tyler had been involuntarily committed for 30 days to a mental health facility in 1986. Thirty years later he still could not possess firearms under the federal law because of his previous commitment to a mental facility. After his attempt to purchase a firearm was denied, Tyler appealed to NICS for relief to possess firearms and was informed that until Michigan establishes a relief program, his federal firearm rights cannot be restored.

Tyler filed a federal lawsuit alleging that because Michigan does not have a relief program, the statue was unconstitutional as it applied to him in that it effectively acted as a permanent ban on his fundamental 2nd Amendment right to keep and bear arms (*id.* at 7). He also claimed the statute violated the equal protection clause, and the government's failure to afford him notice and an opportunity to be heard violated the due process clauses of the 5th and 14th Amendments.

The district court dismissed the suit, reasoning that *Heller's* statement regarding "presumptively lawful" prohibitions on the mentally ill foreclosed such claims. The court also observed that the statute would survive intermediate scrutiny. On appeal, a panel of the Sixth Circuit reversed and remanded the decision to the district court, stating that Tyler had cited a valid 2nd Amendment claim as applied to him. The panel also decided that strict, rather than intermediate, scrutiny applied to the case, given the 2nd Amendment rights at stake (775 F.3d 308 (2014)).

The full Sixth Circuit Court of Appeals later reheard the case and conducted a de novo review of the district court's dismissal of the case for failure to state a claim.

ANALYSIS AND RULING

Tyler's 2nd Amendment claim was the only issue on appeal. The 2nd Amendment provides that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed" (U.S. Const. Amend II).

Tyler argued that the statute "completely and permanently extinguishes his core right to use a firearm in defense of hearth and home" and thus should be subject to strict scrutiny, which is the strictest standard of judicial review. The government argued that barring the mentally ill from possessing firearms is in line with *Heller's* "presumptively lawful" restrictions and therefore does not implicate the 2nd Amendment.

As a first step, the Sixth Circuit sought to determine the extent to which *Heller* provides an answer to the challenged statute's constitutionality. According to Judge Julia Gibbons, who wrote the lead opinion, the court does "not take *Heller's* presumptively lawful" dictum to foreclose [the challenged statute] from constitutional scrutiny" because the statute lacks the kind of "historical pedigree" to "give *Heller* conclusive effect in this case" (*id*. at 10, 11). Further, Judge Gibbons continued, "to rely solely on *Heller.*..would amount to a judicial endorsement of Congress's power to declare, Once mentally ill...always so...Some sort of showing must be made to support Congress's adoption of prior involuntary commitments as a basis for a categorical, permanent limitation on the Second Amendment right to bear arms" (*id.* at 12).

The court next applied Greeno's two-part approach to resolving 2nd Amendment challenges, which it had adopted previously and which has been adopted in several other circuits. First, it determined that the the ban substantially burdens conduct and people protected by the 2nd Amendment but "does not burden the core of the Second Amendment right." Consequently, the court determined that the appropriate level of review was intermediate scrutiny, which requires (1) "the government's stated objective to be significant, substantial, or important and (2) a reasonable fit between the challenged regulation and the asserted objective" (*id*. at 19, citing *U.S. v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013)). The court said this level of scrutiny appropriately places the burden of justifying the statute on the government while giving it considerable flexibility to regulate gun safety (*id*. at 17, 18).

In addition to the broad purpose of curbing crime by keeping guns out of the hands of people not legally entitled to possess them, the government offered two arguments for restricting access to guns by people who had prior involuntary commitments: reducing violent crime and preventing suicides. The court said these were legitimate and compelling interests, but to pass intermediate scrutiny, the government also had to show a reasonable fit between these objectives and its lifetime ban on "the possession of firearms by persons adjudicated to be mentally unstable, some of them long ago" (*id*. at 19, 20). The court found the legislative and empirical evidence presented in support of the statute was inadequate, supported other conclusions, or lacked probative value, concluding in part as follows:

1. Legislative observations about the role of mental illness in two public tragedies (the school shooting at Virginia Tech and a shooting in New York) are "compelling evidence of the need to bar firearms from those just currently suffering from mental illness and those just recently removed from

an involuntary commitment" but are not a justification for barring for life anyone previously committed (*id.* at *21).*

2. Studies showing that those who have attempted suicide in the past are more likely to commit suicide at a later date and that firearms are the most likely means of committing suicide might help explain why it might be reasonable to prevent those with a past suicide attempt from ever possessing firearms, but that evidence does not fully justify the need to permanently disarm anyone who has been involuntarily committed for whatever reason (*id.* at 22).

3. A Connecticut study that showed a 53% reduction rate in violent crime after the state began preventing individuals with prior commitments from buying firearms "may be evidence that prohibiting gun possession lowers violent crime rates, but the data does not meaningfully compare previously committed individuals' propensity for violence with that of the general population" (*id.* at 23).

According to Judge Gibbons, "[n]one of the government's evidence squarely answers the key question at the heart of this case: Is it reasonably necessary to forever bar all previously institutionalized persons from owning a firearm?" (*id*. at 25). Further, Judge Gibbons wrote:

1. The parties "produced scant historical evidence conclusively supporting a permanent ban on the possession of guns by anyone who has been committed to a mental institution" (*id.* at 11).

2. "Under intermediate scrutiny, a statute can permissibly regulate more conduct (or more people) than necessary. However, the amount of overreach must be reasonable...Without any longitudinal evidence documenting that previously committed people, on average, pose a greater threat of violence than members of the general public, we have no way of knowing if [the challenged statute's] permanent ban is 'somewhat over-inclusive' or if it is much more so" (*id.* at 25, 26).

3. Congress itself had recognized that "prior involuntary commitment is not coextensive with current mental illness," having created a program to restore gun rights to previously committed people (*id.* at 12).

The lead opinion concludes:

> Our opinion should not be taken to call into question Congress's power to regulate categorically in this arena. However, [the challenged statute] imposes a lifetime ban on a fundamental constitutional right. More evidence than is currently before us is required to justify such a severe restriction....There is no indication of the *continued* risk presented by people who were involuntarily committed many years

ago and who have no history of intervening mental illness, criminal activity, or substance abuse (*id.* at 26, 27).

Concurring Opinions

Judge McKeague and Judge White wrote separate concurring opinions.

According to Judge McKeague, "mental illness is not static." Consequently, it cannot be constitutional to permanently prevent someone from exercising his or her 2nd Amendment right without giving the person an opportunity to show that he or she is no longer mentally ill (*id.* at 28). Judge White agreed with the lead opinion that the government had connected mental illness with crime and suicide but had not provided adequate evidence to support permanently disqualifying people with a prior commitment from owning firearms (*id.* at 31). But she also said that although she accepted the premise that "once mentally ill does not mean always mentally ill...the translation of that truth into the asserted right to an individualized 'present –tense determination is less clear, as are the contours of such a determination, or what constitutes having regained reason" (*id.* at 29). Thus, she wrote, "my colleagues' concurring opinions find clarity and certainty that eludes me" (*id*. at 29).

Judge Jeffrey Sutton concurred in most of the lead opinion, but wrote a separate opinion, joined by three of the other judges, for reversing the federal law. He wrote that a person's status as "mentally ill" is subject to change over time and *Heller* had created an exemption for someone who currently meets the description not for anyone who ever did (*id*. at 42). "Keep in mind that Tyler is not demanding a gun today," Judge Sutton continued. "He is demanding only what Congress used to permit and what most States still permit: an opportunity to show that he is not a risk to himself or others" (*id*. at 44). "If there is one thing clear in American law today, it is that the government may not deny an individual a benefit, least of all a constitutional right, based on a sky-high generalization and a skin-deep assumption stemming from a long-ago diagnosis or a long-ago institutionalization" (*id. at* 44, 45). "Tyler has plausibly alleged that the government's characterization of him is inaccurate, and he is entitled to relief in the absence of contrary evidence about him" (*id*. at 47).

Judge Batchelder, joined by Judge Boggs, concurred in most of the judgment but, like Judge Sutton, argued for reversal rather than remand. She criticized both the lead opinion and Judge Moore's dissent for failing "to give adequate attention to the Second Amendment's original public meaning in defining the contours of the mental health exception. And it is *that* meaning...informed as it is by the history and tradition surrounding the right, that counts" (*id.* at 33).

> The Second Amendment is part of our law; it is a constitutional right possessed by citizens against their governments. Rather than continuing to subject it—as required by *Greeno*-to a means-ends evaluation guided by our own sense of what is important, we should take this opportunity to overrule *Greeno*. For, as *Helle*r warned, "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional Guarantee at all" (*id*. at 40, citing *Heller*, 554 U.S. at 634).

Judge Boggs concurred in most of the opinion but he took the position that once a person is found to be no longer mentally ill, disqualifying him or her from possessing firearms is unconstitutional. Thus, the proper level of scrutiny, he wrote, is strict scrutiny, as with other fundamental constitutional rights, and under that standard of review, the district court's opinion cannot stand for the reasons stated in that opinion" (*id*. at 32).

Judge Rogers also concurred in most of the lead opinion, concluding that *Heller's* "mentally ill" exception didn't apply to everyone with a prior involuntary commitment. But he agreed with the dissent that the prohibition on gun possession by such people passed intermediate scrutiny.

THE DISSENT

Judge Karen Moore wrote the dissent for four judges, which was joined in part by Judge Rogers.

According to Judge Moore, the statute's constitutionality can be resolved on *Heller's* own terms, a point of view not shared by the lead opinion. Moreover, she wrote, if the two-step inquiry, adopted by the court, were to apply, the statute survives intermediate scrutiny. Consequently, she would uphold it as constitutional and affirm the district court's ruling (*id.* at 52).

According to Judge Moore, the court's rejection of the 2nd Amendment challenge by felons is instructive in Tyler's case.

> [W]e rely on *Heller* to dispossess felons—even if the individual committed a non-violent felony and even if the crime happened thirty years in the past—because Congress chose to dispossess all felons....and *Heller* described this prohibition as "presumptively lawful regulatory measure" (internal citation omitted). This same reasoning applies to prohibitions on the "mentally ill," and the lead opinion has not offered a meaningful distinction (*id.* at 55).

According to Judge Moore:

> Congress could have enacted a firearm disability that disarmed only individuals who are currently involuntarily committed, or Congress could have limited [the statute's] disability to individuals involuntarily committed within the last ten, twenty, or thirty years. The question under intermediate-scrutiny review is whether the law that Congress *did* enact is substantially related to the government's interests, not whether it is the least restrictive law or the wisest policy decision. . . . In enacting [the statute], "Congress permissibly created a broad statute," with an "express intent to establish a 'zero tolerance policy' towards guns" and individuals with a demonstrated history of mental illness (internal citations omitted). Under intermediate scrutiny—and mindful of the context within which we evaluate this law—I believe that the government has demonstrated that [the statute] is substantially related to Congress's objectives of reducing the substantial homicide and suicide rates caused by firearms (*id*. at 61, 62).

Judge Rogers joined in part.

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